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WM. R. STANSBURY

CLERK

No. ~~6123~~ 178

IN THE
Supreme Court of the United States

OCTOBER TERM, ~~1924~~ 1925

THE CHESAPEAKE & OHIO RAILWAY
COMPANY, a corporation, Petitioner,

vs.

THE A. F. THOMPSON MANUFACTURING
COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA, AND BRIEF IN
SUPPORT OF SAID PETITION.

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COMPANY, a corporation, Petitioner,
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COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA, AND BRIEF IN
SUPPORT OF SAID PETITION.

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Your petitioner, Chesapeake & Ohio Railway Company, respectfully shows unto your Honors that it is aggrieved by a final judgment of the Supreme Court of Appeals of the State of West Virginia in

an action at law therein lately pending, brought by the respondent, A. F. Thompson Manufacturing Company, a corporation, against your petitioner Chesapeake & Ohio Railway Company, a corporation, which final order and judgment was made and entered by the said Supreme Court of Appeals of West Virginia on the 4th day of March, 1924; that on the 24th day of March, 1924, your petitioner filed a petition with said Supreme Court of Appeals of West Virginia, praying for a re-hearing of said cause; that on the 1st day of July, 1924, the Supreme Court of Appeals of West Virginia, in response to the prayer of said petition for re-hearing, made and entered an order denying the prayer of said petition, and directing that the final order and judgment theretofore entered in said cause, to-wit, on the 4th day of March, 1924, be made absolute.

A certified copy of the entire transcript of the record in said cause in which said final order and judgment was made and entered as aforesaid, including the proceedings in said Supreme Court of Appeals of West Virginia, is presented and exhibited herewith, and prayed to be taken and read as a part of this petition.

Your petitioner expressly avers, as from said transcript will appear, that in and by said action at law, so instituted by the respondent, there was especially set up and claimed by your petitioner, by motion to strike the evidence of the plaintiff at the conclusion of the evidence in the trial court and otherwise, a title right, privilege and immunity un-

der a statute and law of the United States and authority exercised under the laws of the United States, and especially under the Act of Congress, (Barnes' Federal Code, Sec. 7976; U. S. Comp. Stat. Sec. 8604-A) known as the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act, and that the final decision and judgment of said Supreme Court of Appeals of West Virginia was against the title right, privilege or immunity and the authority exercised under the laws of the United States so set up and claimed by your petitioner.

Your petitioner further represents that the final decision and order of the Supreme Court of appeals of West Virginia was a decision and order of the highest court of said State in which a decision could be had, and that the right, privilege and immunity so set up by your petitioner was necessary for a decision of said cause.

STATEMENT.

It will appear from the transcript of the record that the A. F. Thompson Manufacturing Company, respondent, was engaged in the business of manufacturing sheet metal stoves at its plant in the City of Huntington, West Virginia. In the early part of June, 1920, it ordered from the Chesapeake & Ohio Railway Company at Huntington, two standard box type freight cars to be used in shipping a consignment of the stoves manufactured by it. Pursuant to this order, two cars of the kind specified were furnished by your petitioner, which were ad-

mittedly in first class, weather tight condition. Into these cars, the Thompson Company loaded seventeen hundred (1700) sheet metal stoves, about twenty percent of which were packed in paste board cartons, with the seams sealed with gummed paper, and the remainder wrapped in heavy paper, and enclosed in ordinary packing crates.

On June 9th, 1920, the Railway Company issued Interstate bills of lading signed by the shipper for each of the two cars. The doors were sealed, and the cars consigned to the Richards and Conover Hardware Company at Kansas City, in the State of Missouri.

Upon the arrival of these cars at Kansas City, several days later, they were found by actual inspection to be in the same excellent condition as when they left Huntington, with the original seals unbroken. When they were opened by the consignee, seven hundred and seventy-eight (778) of the stoves were so hopelessly rusted as to be unsalable. The other nine hundred and ninety-two (992) were accepted and paid for by the consignee.

The plaintiff, in the court below, proved as to the seven hundred and seventy-eight (778) damaged stoves:

- (a) Delivery to the carrier in good condition,
- (b) Delivery by the carrier to the consignee in a rusted condition.

No attempt was made to predicate liability on any other ground than that the carrier was an insurer of the stoves in question. Upon the presumption of liability created by this proof, the respondent relied for recovery.

The Interstate bills of lading under which these two cars moved contained the following provision:

"Claims for loss, damage or delay, must be made in writing to the carrier at the point of delivery, or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

No attempt was made by the respondent to show a compliance with this bill of lading provision.

GENERAL REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

Your petitioner, in the trial court, and on appeal in the Supreme Court of Appeals of West Virginia, contended, that upon the record presented, the respondent could not recover, because it had not complied with the bill of lading provisions in reference to the filing of claims, hereinbefore adverted to. Both the trial court, and the Supreme Court of Appeals of West Virginia, upon original argument and upon petition for re-hearing, held, that upon the facts presented, no notice of claim or filing of

claim was necessary as a condition precedent to suit and liability.

Your petitioner therefore avers that the said Supreme Court of Appeals of West Virginia erred in its final judgment aforesaid, in which the final judgment of the Circuit Court of Cabell County, West Virginia was sustained, for the following reasons:

(1) That the bill of lading provision limiting the time within which claims must be filed was valid, and that no claim having been filed within the time required, the plaintiff was barred of its right of recovery, if any.

(2) The Court erred in its construction of the Cummins Amendment to the Carmack Amendment of the Interstate Commerce Act (Barnes' Federal Code, Sec. 7976; U. S. Comp. Stat. 8604-A) insofar as it held that the proviso in that Act which provides:

"Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

excused the respondent from filing claim within the time prescribed by the bills of lading.

Your petitioner further represents that the questions presented by this petition and record have

not yet been passed upon by this court, insofar as your petitioner is advised, and that such questions are of general public interest and importance, particularly to carriers engaged in Interstate Commerce.

WHEREFORE, Your petitioner respectfully prays that a writ of Certiorari be issued out of and under the seal of this court, directed to the Supreme Court of Appeals of West Virginia, commanding said court to certify and send to this court on a day to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of Appeals of West Virginia in said cause, which was entitled in that court "*A. F. Thompson Manufacturing Company, a corporation, plaintiff below, defendant in error v. The Chesapeake and Ohio Railway Company, a corporation, defendant below, plaintiff in error, No. 4996*"; that said cause may be reviewed and all errors in the final judgment and order of the said Supreme Court of Appeals of West Virginia, to the prejudice of your petitioner be corrected by this court, as provided by law, and to the extent necessary for that purpose that said final judgment of the Supreme Court of Appeals, of West Virginia be reversed, set aside and annulled, and that your petitioner may have such other further relief or remedy in the premises to which it may be entitled, and as in duty bound, your petitioner will ever pray, etc.

THE CHESAPEAKE & OHIO RAILWAY
COMPANY, a corporation,

By C. N. Davis

..... C. W. Strickling
Of Counsel.

..... C. N. Davis

..... C. W. Strickling
Attorneys for Petitioner.

STATE OF WEST VIRGINIA,
COUNTY OF CABELL, ss:

CARY N. DAVIS, being duly sworn, deposes and says, that he is counsel for the Chesapeake & Ohio Railway Company, a corporation, the above named petitioner; that he has read the foregoing petition, and is authorized to make this affidavit, and that the facts therein alleged are true, as he verily believes.

..... C. N. Davis

Taken, sworn to and subscribed before me, the undersigned Notary Public, this 20th day of September, 1924.

My commission expires November 17th, 1930.

..... J. W. Hagen, Jr.
Notary Public.

I hereby certify that I have examined the foregoing petition, and in my opinion, the petition is well founded, and that this cause is one in which the prayer thereof should be granted by the Supreme Court of the United States.

C. N. Davis

Of Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY
COMPANY, a corporation, Petitioner,

vs.

A. F. THOMPSON MANUFACTURING
COMPANY, a corporation, Respondent.

BRIEF ON BEHALF OF THE CHESAPEAKE &
OHIO RAILWAY COMPANY IN SUPPORT OF
ITS PETITION FOR A WRIT OF CERTIORARI.

The writ of *certiorari* petitioned for in the foregoing petition, for the reasons therein stated, is based upon the failure of the Supreme Court of Appeals of the State of West Virginia to give effect to the bill of lading provision mentioned in said petition, which defines the time within which claims for loss or damage may be filed.

Notwithstanding the fact that similar provisions have been held reasonable by this and other courts, the Supreme Court of Appeals of West Virginia, by its judgment and opinion, held, that by virtue of the last proviso of the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act (Barnes' Federal Code, Sec. 7976; U. S. Comp. Stat. Sec 8604-a) no claim was required to be filed in this case as a condition precedent to suit and recovery.

A. F. Thompson Mfg. Co. v. C. & O. Ry. Co.
(W. Va.) 123 S. E. 421.

POINTS AND AUTHORITIES RELIED UPON

1: The provisions in the interstate bills of lading under which the two cars here in question moved, which limit the time for filing of claim to four months as a condition precedent to liability, are reasonable.

No citation of authority is necessary to support this proposition. It does not contravene any of the provisions of the Acts of Congress, and similar provisions have been repeatedly held reasonable by this court.

Georgia, Florida & Alabama R. R. Co. v.
Blish Milling Co. 241 U. S., 190; 36
Sup. Ct. 541; 60 L. Ed. 948.

2: The damage to the shipments involved herein did not occur while the shipments were being loaded or unloaded. If, therefore, the respondent desires to put himself within the last proviso of the Cummins Amendment above referred to, it must be shown that such damage resulted from the *negligence of carrier*.

The record will indicate that there was no evidence of *negligence* on the part of the carrier. The respondent was furnished with first-class weather-tight cars. They were sealed at Huntington, West Virginia, and went forward to Kansas City, Missouri, within a normal length of time, and upon arrival were shown by actual inspection to be in weather-tight condition, with no evidence of leakage or other equipment defects, and with the original seals unbroken. The respondent proved that the stoves were delivered to the carrier in good condition, and that a part of them were delivered to the consignee badly rusted. Upon the presumption arising from this proof, without proof of a compliance with the bill of lading provisions relating to the filing of claim, the respondent relied for recovery.

The pertinent parts of the Cummins Amendment are:

"If the loss, damage or injury complained of was due to . . . damage in transit by carelessness or negligence . . ."

In order, therefore, to support a recovery, in

the absence of proof of the filing of claim, it was necessary for the respondent to have shown that the damage complained of resulted from the *carelessness or negligence* of this petitioner. This it failed to do. The Supreme Court of West Virginia, by its judgment and opinion, held, that proof of delivery in good condition to the carrier, and delivery in less than good condition by the carrier, to the consignee, raised a presumption of negligence and put the case within the provisions of the above-mentioned proviso.

It is submitted that this presumption is not, properly speaking, a presumption of negligence, but rather a presumption of liability arising from the fact that when goods are delivered to a carrier for transportation, that carrier immediately becomes an insurer. If the goods are lost or damaged in transit, the carrier can only escape liability by showing that the loss or damage was the result of one of the causes commonly known as the excepted risks. It is true, of course, that many of the courts have loosely said, as did the Supreme Court of West Virginia in this case, that the presumption thus created is a presumption of negligence; but whether that statement is or is not accurate, (and we think it is not), such a presumption will not put a shipper within the proviso of the Cummins Amendment and excuse him from filing claim when he sustains a loss, either by a loss of all or part of his goods in transit, or by their damage, unless that damage resulted from some active negligence on the part of the carrier.

Georgia, Florida & Alabama R. R. Co. v.

Blish Milling Company, 241 U. S.,
190; 36 Sup. Ct., 541; 60 Law Ed. 948.

Gillette Safety Razor Co. v. Davis (C. C.
A.) 278 Fed., 864, 866.

Certiorari Refused, 259 U. S. 587.

Cunningham v. Missouri Pacific R. R. Co.
(Mo.) 219 S. W. 1003.

Hubbard Grocery Co. v. Payne (W. Va.)
118 S. E., 153.

Kahn v. American Ry. Express Co. 88 W.
Va., 17; 106 S. E., 126.

Hailey v. Oregon Short Line R. R. Co.,
253 Fed. 569, 572.

The Supreme Court of West Virginia, in the case of *Kahn v. American Railway Express Company*, *supra*, following the doctrine laid down by this Court in the *Georgia, Florida & Alabama Railroad Company v. Blish Milling Company* case, *supra*, held, that where a loss occurred of part of the shipment in transit, that the filing of claim within the time provided for in the bill of lading was necessary as a condition precedent to recovery. In both of these cases, the only evidence was, that the goods were delivered to the carrier in good condition, and that a less amount than that delivered to the carrier was delivered by the carrier to the consignee. In case of loss, as in case of damage, the carrier is subject to the presumption of liability. It is, we think, inconceivable, that in the case of loss the presumption created against the carrier can be said not to be a presumption of negligence, and thus require the shipper to file a claim, and that in the case of damage the

presumption created from similar proof can be said to be negligence and excuse the shipper from filing claim. If the reasoning followed by the Supreme Court of Appeals of West Virginia in the case at bar were followed to its logical conclusion, all cases in which either loss or damage occurred would be cases in which the shippers or consignees would not be required to file claims, and the carriers would thus be deprived of the right to have notice in time to make prompt investigation, a right which is an integral part of all shipping contracts, recognized in the Act of Congress itself, which provides that no shorter period than four months shall be fixed by a carrier for filing claim.

For these reasons, therefore, it is respectfully submitted, that the writ of *certiorari* prayed for in the annexed petition should be allowed, and the errors of law committed by the Supreme Court of Appeals of West Virginia corrected by this Court.

C. N. Davis

C. W. Strickling

Attorneys for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY
COMPANY, a corporation, Petitioner,
vs.
A. F. THOMPSON MANUFACTURING
COMPANY, a corporation, Respondent.

TO A. F. THOMPSON MANUFACTURING COM-
PANY, A CORPORATION, AND HENRY
SIMMS, ESQUIRE, ITS ATTORNEY:

You will please take notice that upon a certified copy of the transcript of the record in this cause, and upon the annexed petition and brief of The Chesapeake & Ohio Railway Company, a corporation, we shall move the Supreme Court of the United States, at the Capitol, in the City of Washington, District of Columbia, on the sixth day of October, 1924, at the opening of said Court on that day, or as soon thereafter as counsel can be heard, for the allowance of a writ of *certiorari* to the Supreme Court of Appeals of West Virginia in the above-styled case, and for such other and further relief as the foregoing petitioner may be entitled to, or as the nature of the case may require.

Dated Huntington, West Virginia, this 20th day of September, 1924.

C. N. Davis

C. W. Strickling

Attorneys for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

THE CHESAPEAKE & OHIO RAILWAY
COMPANY, a corporation, Petitioner,

vs.

A. F. THOMPSON MANUFACTURING
COMPANY, a corporation, Respondent.

Now comes the petitioner, by Cary N. Davis, its attorney, and moves this Court, upon a certified copy of a transcript of the record herein, and upon the annexed petition, sworn to on the 20th day of September, 1924, for a writ of certiorari, directed to the Supreme Court of Appeals of West Virginia, to bring before this Honorable Court, for review, the proceedings herein in said Supreme Court of Appeals of West Virginia, and for such other and further relief in the premises to which this petitioner may be entitled and the nature of the case require.

C. N. Davis

Counsel for Petitioner.

Office Supreme Court, U. S.

FILED

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WM. R. STANSBURY
CLERK

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 178.

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, a corporation, PETITIONER,
vs.

THE A. F. THOMPSON MANUFACTURING
COMPANY, a corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF APPEALS OF THE STATE
OF WEST VIRGINIA.

BRIEF OF
C. N. DAVIS AND C. W. STRICKLING
Counsel for Petitioner.



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COMPANY, a corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME
COURT OF APPEALS OF THE STATE
OF WEST VIRGINIA.

1.

OPINION IN STATE COURT.

The opinion delivered by the Supreme Court of Appeals of West Virginia in this case, is reported in 95 W. Va. 670, 123 S. E. 421.

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6th, 1916, c. 448, § 2, (39 Stat. 726, Comp. Stat. § 1214), under which this court may require by certiorari, or otherwise, that there be certified to it for review, any cause wherein a final judgment has been rendered by the highest court of a State in which a decision could be had, and where any title, right, privilege, or immunity is claimed under the constitution or statutes of the United States. The right claimed by the petitioner in the West Virginia State Courts was the right to require that claim, in writing, be filed with it or its connections within four months after the delivery of the shipment involved in this case, as a condition precedent to suit and judgment, as required by the provisions of the interstate bills of lading under which said shipment moved. The State Courts of West Virginia held, that under the provision of the Act of Congress of March 4th, 1915, known as the First Cummins Amendment (38 Stat. 1196, 1197, c. 176), amending Section 20 of the Act to Regulate Commerce, of February 4th, 1887, c. 104, 24 Stat. 386, as amended by Section 7 of the Act of June 29th, 1906, c. 3591, 34 Stat. 593, 595 (Comp. St. §8604a), it was not necessary, as a condition precedent to suit and judgment, that such claim be filed.

The claim that it was necessary that such claim be filed as a condition precedent to recovery was

advanced by the petitioner when the case was tried in the Circuit Court of Cabell County, West Virginia, by motion made at the conclusion of all the evidence, in accordance with the West Virginia practice, to strike out the evidence of the respondent and to direct a verdict for the petitioner, because the record did not show that claim had been filed within four months, or any other time, as required by the bills of lading. This motion was overruled, and a proper exception made (R. 83, 84). The same question was likewise raised in the same court by an instruction offered by the petitioner, and refused by the court (R. 87), as well as by motion made to set aside the verdict and award petitioner a new trial, as shown by the final judgment of the above mentioned Circuit Court (R. 89). The same questions were raised in the Supreme Court of Appeals of West Virginia, by petition for writ of error (R. 2, 3), which contained the specific assignment of error that the lower court erred in holding that there was no necessity of filing claim in writing. The Supreme Court of West Virginia held, by its judgment of March 4th, 1924 (R. 92), and by its refusal to grant a re-hearing, by an order made July 1st, 1924 (R. 96), that claim in writing was not required to be filed as a condition precedent to recovery, notwithstanding the specific provisions of the shipping contracts, as contained in the bills of lading.

The following cases decided by this court sustain the jurisdiction of this court to hear and determine the questions presented by this record:

American Railway Express Co. vs. Lindenburg, 260 U. S. 584,.....L. Ed.....
43 Sup. Ct. Rep. 206.

3.

STATEMENT OF FACTS.

It will appear from the record that The A. F. Thompson Manufacturing Company, respondent, was engaged in the business of manufacturing and selling sheet metal stoves at its plant at Huntington, West Virginia. In the early part of June, 1920, it ordered from petitioner, The Chesapeake and Ohio Railway Company, at Huntington, two standard box type freight cars, to be used in shipping a consignment of the stoves manufactured by it. Pursuant to this order, two cars of the kind specified were furnished by the petitioner, which were admittedly in first-class weather tight condition (R. 43, 69). Into these cars the respondent loaded seventeen hundred sheet metal stoves, above twenty per cent of which were packed in pasteboard cartons, with the seams sealed with gummed paper. The remainder were wrapped in heavy paper, and packed in ordinary open packing crates.

On June 9th, 1920, the carrier issued interstate bills of lading, signed by the shipper, for each of the two cars. (R. 15 to 23.) The doors were sealed, and the cars consigned to the Richards and Conover Hardware Company, at Kansas City, in the State of Missouri.

Upon the arrival of these cars at Kansas City several days later, they were found, by actual in-

spection, to be in the same excellent weather-tight condition as when they left Huntington, (R. 73 to 76, 81, 82), with the original seals unbroken, (R. 59), and no evidence of any leakage or other defects which might be calculated to damage their contents. When they were opened by the consignee, seven hundred and seventy-eight of the stoves were so hopelessly rusted that they were unsalable; the others were accepted and paid for by the consignee.

The respondent in the trial court proved, as to the seven hundred and seventy-eight damaged stoves:

(a) Delivery to the carrier in good condition;

(b) Delivery by the carrier to the consignee in a rusted condition.

No attempt was made to show that there was any negligence on the part of the carrier in loading, receiving, transporting or unloading the shipment, or to predicate liability on any other ground than that the carrier was an insurer of the stoves in question. Upon the presumption of liability created by this proof the respondent relied for recovery.

4.

SPECIFICATION OF ASSIGNED ERRORS.

Your petitioner relies upon the following assigned errors, specifically set up in its petition filed in this court:

(1) That the State Courts of West Virginia, including the highest court of that State in which a final judgment could be had, erred in holding that, under the Act of Congress of March 4th, 1915, known as the First Cummins Amendment, the respondent was relieved of the necessity of filing claim within the time required by the interstate bills of lading, as a condition precedent to suit and recovery.

5.

ARGUMENT.

At the time of the delivery of the stoves involved in this case to the petitioner for transportation, the petitioner issued bills of lading covering the two cars shipped, which were signed by the shipper. The third paragraph of Section 3 of the conditions of each of these bills of lading contained the following provisions:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable. (R. 17, 18, 21, 22)"

By the very terms of the bills of lading, the shipment was made subject to all conditions therein contained, and the tariffs and classifications in effect at that time.

The provisions of the shipping contracts relating to the time of filing claims are valid. They do not contravene any of the provisions of the Acts of Congress, and similar provisions have been repeatedly held reasonable and valid by this court. *Georgia, Florida and Alabama R. R. Co. vs. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. Rep. 541.

The respondent made no attempt to show a compliance with the above quoted bill of lading provisions, but relied upon the last proviso contained in Chapter 176 of the Act of Congress of March 4th, 1915, known as the First Cummins Amendment, above adverted to. The last two provisos of this Chapter are:

“Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.”

It should be noted at the outset that the shipping contracts above referred to were made on old forms of bills of lading, in use prior to the enactment of the First Cummins Amendment, and do not, as do the bills of lading now in use, contain the final pro-

viso of that Amendment. We must concede, however, that the provisions in the contracts relating to the filing of claim, are qualified by the final proviso of the First Cummins Amendment.

Were it not for this final proviso, there would be no question as to the validity of the defense interposed in the court below by the petitioner. *Georgia, Florida and Alabama R. R. Co. vs. Blish Milling Co., supra.*

It follows then, that the sole question here involved is whether under the proof adduced by the respondent it was excused, by virtue of the final proviso of the First Cummins Amendment, from its duty to affirmatively show a compliance with the above quoted bill of lading provisions.

It is submitted that this record does not present such a case. It is undisputed that whatever happened to the stoves involved in this shipment, happened between the time they left Huntington and the time they arrived at Kansas City. The case is therefore a case of damage in transit.

Under the second proviso of the above mentioned Act of Congress, filing of claim is dispensed with in such circumstances only when damage results from carelessness or negligence. *Barrett vs. Van Pelt*, 268 U. S. 85, 69 L. Ed. 465, 45 Sup. Ct. Rep. 437. *Davis, Director General vs. John L. Roper Lumber Co.*, (U. S. Nov. 16, 1925), 46 Sup. Ct. Rep. 28.

No claim having been filed, it is essential that the record show that the shipment here involved was

damaged in transit by carelessness or negligence. To determine whether such a showing was made, it is necessary to analyze the situation as presented by the record.

The respondent proved that the stoves were delivered to the carrier in good condition, and that a part of them were delivered by the carrier to the consignee, badly rusted. Upon the *prima facie* presumption arising from this proof the respondent relied for recovery. The carrier proved that the respondent was furnished with first-class weather tight cars (R. 43, 69); that the cars were sealed at Huntington, West Virginia, and went forward to Kansas City, Missouri, within a normal length of time where, upon their arrival, they were shown, by actual inspection, to be in weather tight condition, with no evidence of leakage or other equipment defects (R. 73 to 76, 81, 82), and with the original seals unbroken (R. 59).

Under this proof the carrier can not be said to have been guilty of carelessness or negligence, which resulted in the damage to the shipment in transit.

It is true, when a shipper shows delivery of goods to a carrier in good condition, and non-delivery or delivery to the consignee in damaged condition, that there arises a *prima facie* presumption of liability. It is likewise true, that many of the courts have said that this presumption is a presumption of negligence. But it was certainly not the intention of Congress to exempt shippers from their duty to give to carriers reasonable notice of claims where such claims were based on a mere

prima facie presumption. Whether this presumption be called a presumption of negligence or one of liability is, in our view of it, immaterial, as it is based entirely upon the peculiar relation that exists between shippers and carriers, which makes a carrier an insurer of goods entrusted to it for transportation, and, in case of loss, injury or damage to such goods, imposes upon it the burden of showing that such loss resulted from one of the so-called excepted risks. In such cases liability is not imposed upon carriers because of negligence, but is imposed upon them because, as insurers, they must either deliver goods entrusted to them in the same condition as when they were received, or show affirmatively that their failure to make such delivery was the result of one of the causes coming under the excepted risk classification. It often happens that carriers are held liable under their strict liability as insurers, where loss or damage results from some cause beyond their control, and not from negligence, where such loss can not be brought under one of the common law exceptions.

When Congress saw fit to exempt certain classes of claims from the requirement that reasonable notice be given, it can be fairly presumed that such exceptions had some basis in reason. It has heretofore been the policy of the courts and of the law makers to require that reasonable notice of claims be given, where the carrier had no opportunity of observing or ascertaining that something had happened for which a claim might be made, so that a prompt and thorough investigation might be made to determine the question of liability. Such a policy is in accord with sound reason and fairness. On

the contrary if, during the transportation of a shipment, something happened which might reasonably be calculated to put the carrier on notice that a shipment had been damaged, and that therefore a claim might be expected, such notice might not be necessary, as the carrier would already have notice of the fact that a claim might reasonably be expected.

As this Court said, in *Barrett vs. Van Pelt*, *supra*:

"There are such differences between liability without fault and that resulting from negligence that Congress upon good reasons might permit carriers to require notice and filing of claim within the specified times where the carrier is without fault, and forbid such a requirement in the cases referred to where the loss results from the carrier's negligence. Notice and filing of claim warns the carrier that there may be need to make investigations which otherwise might not appear to be necessary; and if notice of claim is given and filing of claim is made within a reasonable time it serves to enable the carrier to take timely action to discover and preserve the evidence on which depends a determination of the merits of the demand. As to claims for damages not due to negligence in the absence of notice, there may be no reason for anticipating demand or to investigate to determine the fact or extent of liability. But as to damages resulting from carelessness or negligence, it reasonably may be thought the the carrier has such knowledge of the facts or has such reason to expect claim for compensation to be made against it that the

carrier should not be permitted to exact such notice and filing of claim as a condition precedent to recovery. No other basis of classification seems as well supported in reason as the element of carelessness or negligence."

The instant case is strongly illustrative of the unfair result which would be reached if the rule announced by the Supreme Court of West Virginia were sustained. In this case the carrier had no notice of anything that might lead it to believe that any claim might be expected. If suit had not been promptly instituted, and if the respondent had taken advantage of its privilege of waiting two years before instituting suit, it, the carrier, would have had no opportunity to make prompt and thorough investigation and preserve the evidence upon which the question of liability might be determined.

This court held, in *Barrett vs. Van Pelt, supra*, that the phrase in the First Cummins Amendment, "by carelessness or negligence," should be construed as being included in the definition of all classes of claims, and construed the final proviso of that amendment to read as follows:

"Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Under this construction, the phrase "by carelessness or negligence" applies to all classes of

claims,—loss, damage or injury. The rule of proof, above discussed, which gives rise to a presumption against the carrier upon a showing of delivery in good condition and total or partial non-delivery by the carrier to the consignee, or delivery by the carrier to a consignee in a damaged condition would, if the holding of the Supreme Court of Appeals of West Virginia in the present case were followed, entirely relieve all shippers from filing claims where there was either a loss, damage or injury, because the presumption arising from the rule of proof above discussed, is exactly the same, whether the claim be one of loss, or damage or injury. In other words, if in the instant case, a part of the stoves had been lost instead of damaged, and the proof of the respondent showed that fact, there would be imposed upon the carrier a *prima facie* presumption of liability. Could it be said that Congress intended by the final proviso of the First Cummins Amendment, to exempt a shipper from filing claim in such a case? We think not. If this be true, the conclusion is irresistible that it was likewise not the intention to exempt a shipper from filing claim where there was a damage in transit and no proof of negligence or carelessness other than the *prima facie* presumption arising from the showing hereinbefore mentioned made by the respondent.

See *Hailey vs. Oregon Short Line R. Co.*, 253 F. 569, 572; *Gillett Safety Razor Co. vs. Davis* (C. C. A.) 278 F. 864; *Cunningham vs. Missouri Pacific R. Co.*, (Mo. App.), 291 S. W. 1003.

Under all these circumstances, we believe that this record does not present a case which brings the

respondent within the final proviso of the First Cummins Amendment, and which excused it from a compliance with the valid bill of lading provisions requiring that seasonable notice be given to the carrier of the claim here asserted by filing such notice in writing within four months after the delivery of the shipment in question.

It is respectfully submitted that the final judgment of the Supreme Court of West Virginia in this case should be reversed.

C. N. DAVIS,
C. W. STRICKLING,
Counsel for Petitioner.



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IN THE
Supreme Court of the United States

October term, 1925

No. 178

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY, a corporation, PETITIONER.

VS.

THE A. F. THOMPSON MANUFACTURING
COMPANY, a corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS
OF THE STATE OF WEST
VIRGINIA.

I.

STATEMENT OF FACTS

The statement of facts made by Counsel for petitioner in their brief filed herein on pages four and five thereof is fair and needs no addition or modification.

II.

ARGUMENT

It is conceded by the Counsel for Petitioner that the provisions in the contracts commonly called bills of lading relating to the filing of claims are qualified by the final proviso of the First Cummins Amendment. It is further conceded by Counsel for Petitioner in their brief that what ever happened to the stoves involved in this shipment happened between the time they were delivered to The Chesapeake & Ohio Railway Company at Huntington, West Virginia, and the time they arrived in Kansas City, Missouri, the point of final destination.

The common carriers are not made insurers of freight entrusted to their care as is very often loosely stated. They are, however, conclusively presumed as a matter of law to be guilty of carelessness or negligence in the handling of shipments of freight in their possession unless the carrier is able to prove that the loss, damage or injury to the goods was caused by one of the exceptions which are, Acts of God, Acts of Public Enemy or causes due to the inherent or intrinsic nature of the shipments. The reason for the rule is based upon the experience of centuries and from the fact that it is well known and conceded by practically all Courts that if a plaintiff were compelled to establish in a suit for damages to goods in transit that the damage was caused by negligence or carelessness of the common carrier to whom the goods had been entrusted it would be practically im-

possible in most cases to ever establish the cause, because the goods are entirely in the care and custody of the common carrier and the shipper has no means to trace the shipment, or to discover how the loss occurred. This is hardly a proper subject of controversy in this case because it seems to be about the most universally admitted and established rule of law known to the Courts, not only of the United States but also of England, where, of course, the rule originated.

We could cite many decisions of every Court in the Union in support of this proposition, but deem it unnecessary and shall only cite from decisions of the United States Supreme Court bearing upon this point and of some of the States of the Union which seem to be decisive on this question.

In the case of Hall vs. Nashville and Chattanooga Railway Company, 13 Wall, U. S. 367, 20th L. E. D., 594, a case where this question was at issue, Mr. Justice Strong in delivering the opinion spoke as follows:

"A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance, and when a loss occurs, unless

caused by the Acts of God, or a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, he has in fact consented by his contract to be dealt with as if it were not so. He does not stand, therefore, on the same footing as an insurer, who may have entered into his contract of indemnity, relying upon the carriers' vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of its loss."

We also cite *The Majestic*, 166, U. S. 375, 17 S. C. T. 597, 41 L. ed. 1039; *The Caledonia*, 157, U. S. 124, 15 S. C. T. 537, 39 L. ed. 644; *The Edwin I. Morrison*, 153, U. S. 199, 14 SCT 823, 38 L. ed. 688; *Memphis, etc., R. Co. vs. Reeves*, 10 Wall. 176, 19 L. ed 909; *Clark vs. Barnwell*, 12 How. 272, 13 L. ed. 985.

Corpus Juris, Volume 10, Carriers, Section 576:

"Where a loss of, or injury to, goods while in the carrier's possession is shown, a *prima facie* case is made out against it, and the burden of proof then devolves on it to show that the loss or injury was due to one of the causes excepted at common law, such as an act of God or an act of the enemy, an act or fault of the shipper, the inherent nature of, or defects in, the property shipped, or a seizure thereof under legal process, if it re-

lies on such common-law exceptions as a defense; and it has been held that the Carmack amendment which invalidates the provisions of any state law nullifying contracts limiting a carrier's liability for loss or damage to the agreed value, and which makes no provision as to evidence, does not invalidate a state law expressly placing the burden of proof on the carrier to show that loss or injury occurred by reason of an excepted cause."

National Rice Mill Company vs. New Orleans, etc., R. Company, 132 La. 615, 61 S. 708.

It has further been held that, "the rule that proof of delivery to a railroad company of an interstate consignment in good condition and of its receipt in bad condition is a sufficient *prima facie* showing to establish carrier's liability is not affected by the Carmack amendment." Corpus Juris, Volume 10, Carriers, Section 572.

Collins vs. Denver, etc., R. Company, 181 Mo. A. 213, 167, SW 1178.

Counsel for the Petitioner advance the novel argument that the presumption of neglect on the part of the shipper in this case is not a presumption of neglect but a presumption of liability. We believe that the statement of Mr. Justice Strong of the Supreme Court of the United States made in the case of Hall vs. Nashville and Chattanooga Railway Company, hereinbefore quoted, is a complete refutation of their claim in that respect.

Mr. Justice Strong states the law is that where goods are delivered to the carrier in good condition and are delivered by the carrier in bad condition at the point of destination it raises a conclusive presumption of misconduct and breach of duty on the part of the carrier and this can only mean that it raises a conclusive presumption of negligence and carelessness on the part of the carrier. It should be noted that Mr. Justice Strong holds that the presumption in such case is conclusive and not disputable. Of course, if the carrier attempts to exculpate itself it can only do so by introducing evidence, which may tend to show that the damage was caused by one of the excepted causes hereinbefore referred to. If the carrier does not attempt to exonerate itself in such manner the conclusive presumption of neglect attaches with full force and vigor. A presumption of law is as binding, and probably more binding, upon a Court than any kind of evidence that can be introduced.

See Jones on Evidence, Second Edition, Section 11.

“When an inference derives from the law some arbitrary or artificial effect and is obligatory upon judges and juries, that inference is a presumption of law. It arises when the facts found are in point of law inconsistent with any supposition except that of the existence or non-existence of the fact in controversy, in which case the conclusion is necessary, independently of any belief based upon what is

more or less probable, because the law declares the uniform effect of such a state and condition of circumstances. Presumptions of law are generally divided into two classes, conclusive and disputable."

Citing *Sun Mutual Insurance Company, vs. Ocean Insurance Company*, 107, U. S. 485, also, *First Greenleaf Evidence*, Section 44.

"Conclusive or absolute presumptions of law are rules determining the quantity of evidence requisite for the support of any averment which is not permitted to be overcome by any proof that the fact is otherwise."

See *Jones on Evidence*, Second Edition, Section 15:

"This rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged."

Citing *The Nitro Glycerine Case*, 15 Wall, 524; *Philadelphia Railway Company, vs. Anderson*, 72 Md. 519.

We believe that the above citations show beyond cavil, that there is a conclusive presumption of negligence in the case at bar that the damage to the goods was caused by negligence and carelessness of *The Chesapeake and Ohio Railway Company*.

This case was tried to a jury under common law procedure and it is conceded by Counsel for Petitioner that the Respondent proved that the goods were delivered to the Petitioner in good condition and were delivered by the Petitioner in bad condition, and under the law as laid down by Mr. Justice Strong, above referred to, the law raises a conclusive presumption of negligence and the jury in finding their verdict in favor of Respondent in the Circuit Court of Cabell County, West Virginia, passed upon the question of negligence on the part of The Chesapeake and Ohio Railway Company and decided that the railroad company was guilty of negligence in this case in legal effect exactly the same as if there had been positive and affirmative proof of the exact cause of the damage to the stoves while in transit. The legal effect of failure of The Chesapeake & Ohio Railway Company to introduce any evidence in its behalf to show how the injury to the stoves occurred while in its custody amounted to a concession before the jury that the railroad company was guilty of negligence. It is the law that if a fact is conceded by a party to the suit, or by its Counsel, during the trial of a cause, it is absolutely binding upon such party. In other words, The Chesapeake & Ohio Railway Company was confronted with an absolute presumption of neglect on its part after the plaintiff had introduced its evidence in the Circuit Court of Cabell County, West Virginia, and its Counsel, of course, were fully aware of such presumption of neglect and

by the failure to introduce any evidence in an attempt to bring the cause of damage within the excepted causes, such as Act of God, etc., they in legal effect conceded that the plaintiff had established a case of negligence against the defendants in the Circuit Court.

We believe that we have successfully refuted the claim of Counsel for Petitioner that liability is not imposed upon carriers because of negligence but is imposed upon them as insurers (See pp. 9 and 10 of Brief Counsel for Petitioners.) Certainly no one should assume that Congress in enacting the First Cummins Amendment intended to destroy the common law presumption of negligence in cases similar to the case at bar; nor should anyone assume or argue that it was the intent of Congress to change the rules of evidence as they existed in such cases at the time of the enactment of the First Cummins Amendment. Certainly Congress must be presumed to have known and to have been fully conversant with the legal obligations of common carriers in such cases and did not intend to modify or interfere with the existing legal obligations of the carriers or with the rules of evidence relating to the same as uniformly held by the Courts prior thereto.

Counsel for Petitioner argue on page 10, their brief, as follows:

"It has heretofore been the policy of the courts and of the law makers to require that reasonable notice of claims be given, where the carrier had no oppor-

tunity of observing or ascertaining that something had happened for which a claim might be made, so that a prompt and thorough investigation might be made to determine the question of liability."

By the enactment of the First Cummins Amendment Congress surely settled that point and made it the law that in all cases where the loss, or damage was caused by negligence or carelessness on the part of the common carrier in transit cases that no notice of claim is necessary to be given to the common carrier making the First Cummins Amendment apply to the law as it was at the time of the enactment of the amendment relating to the liability of carriers. In other words, "carelessness and negligence" as used in the First Cummins Amendment include all classes of carelessness and negligence, both carelessness and negligence which must be affirmatively proved as in the case of *Barrett vs Van Pelt*, 268 U. S. 85, cited by Counsel for Petitioner, and negligence and carelessness which is conclusive and absolutely presumed as in the case at bar. It is the contention of Respondent that a conclusive presumption of carelessness and negligence, as exists in the case at bar is within the meaning of the words, "carelessness and negligence" as used in the First Cummins Amendment.

The case of *Barrett vs. Van Pelt*, referred to above, and cited by Counsel for Petitioner has no application to the case at bar because the facts

are not similar to the facts in the case at bar. In the Barrett vs. Van Pelt case the claim was for damage due to delay in shipping the goods and not to any actual damage to the goods themselves whatever. The plaintiff claimed that he had shipped some eggs over the Adams Express Company to the New York market and that they should have arrived in thirty hours from the time they were delivered but they were not delivered until several days thereafter and that in the interim the price of eggs had declined in the New York market, and he lost money by reason thereof. There was no damage alleged to the eggs themselves. Of course, there is no presumption of negligence on the part of the carrier in case of delayed shipments as there is in the case at bar. It has also been held in cases where a shipper claims that a common carrier has been guilty of negligence in delaying a shipment of goods that it was incumbent upon the shipper to establish by affirmative evidence that the delay was caused by the negligence of the common carrier, and that the proximate cause of damage to the goods was the negligent delay. In establishing these facts the burden is on the shipper always to show what is the reasonable or usual time for the shipment of goods to arrive in the particular case and that the damage would not have occurred had the goods been delivered in the usual time. This is certainly an entirely dissimilar state of facts from the facts established in the case at bar, and the rules of law applicable thereto are also entirely different.

See Corpus Juris, Volume 10, Carriers, Section 404.

“A carrier is not an insurer against delay in the transportation of goods. The principle on which the carrier's extraordinary liability is founded does not extend to the time occupied in transporting the goods. As to the time of delivery, their liability stands on the same ground as that of ordinary bailees for hire. (Citing, Southern Pacific Railway Company, vs. Arnett, 126, Fed. 75, 61 CCA 131; Farmers' L. & T. Co. vs. Northern Pacific Railway Company, 120 Fed. 873, 57 CCA 533; Delaney vs. U. S. Express Company, 70 W. Va. 502).”

It is plain, therefore, that there is no presumption of negligence on the part of the common carrier in the case of Barrett vs. Van Pelt, and that case cannot be used to uphold the contention of Counsel for Petitioner in this case; likewise the case of Davis, Director General vs. Roper Lumber Company, U. S. 46 Sup. Ct. 28. It has no bearing upon the case at bar because in the Roper case the property had actually been delivered to the wrong person and not to the legal owner, and the loss was due solely to mis-delivery and this Court properly held that such a state of facts did not bring the case within the second proviso of the First Cummins Amendment.

The other cases cited by Counsel for Petitioner are not applicable to the case at bar. The plaintiff in the Circuit Court of Cabell County, West

Virginia by legal and competent evidence established that The Chesapeake & Ohio Railway Company was guilty of negligence and carelessness in the handling of the shipment of stoves in transit; that the absolute presumption of law which is raised in this case is as much proof of carelessness and negligence as if established by oral or documentary evidence showing the exact cause of damage. We further believe that the jury which rendered the verdict against the railroad company, after having heard all evidence in the case, has settled all questions as to carelessness and negligence adversely to the said railroad company, and that the verdict of the jury must stand. Even if the defendant had introduced evidence in an attempt to exonerate itself from liability under any of the excepted causes, the question would still have been one to be settled by the jury and if the jury had rendered a verdict in favor of the plaintiff the Appellate Court would not have interfered with the verdict, unless it was plainly contrary to the weight of evidence or to the preponderance of evidence. Not having introduced any evidence to contradict the absolute and conclusive presumption of negligence and carelessness on the part of the railroad company, the jury had the absolute right to render a verdict in favor of plaintiff, which verdict cannot be reversed in an Appellate Court.

We further believe that Congress in enacting the First Cummins Amendment, intended it to apply to the existing state of law regulating lia-

bility of common carriers and did not intend in any way to abrogate or modify the common law presumption of absolute negligence applicable to the state of facts proved in the case at bar.

We therefore believe that this record does present a case which brings the Respondent within the final proviso of the First Cummins Amendment, and that it was not necessary to give notice to the carrier of the claim herein asserted within four months after delivery of shipment in question.

It is respectfully submitted that the final judgment of the Supreme Court of Appeals of West Virginia in this case should be affirmed.

HENRY SIMMS,
LEWIS A. STAKER,
Counsel for Respondent.

December 21, 1925.